In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-146

WILLIAM P. CATENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on ten counts of presenting and causing to be presented claims against the United States to an agency of the United States, knowing said claims to be false, fictitious, and fraudulent, in violation of 18 U.S.C. 287. He was sentenced to 60 days' imprisonment and fined a total of $10,000. The court of appeals affirmed (Pet. App. 14-29). Petitioner's principal contention is that since his claims were presented to a private insurance company, which passed them on to the United States, the indictment was fatally defective for omitting express reference to 18 U.S.C. 2(b).

Petitioner, a physician, submitted false Medicare claims to Pennsylvania Blue Shield and the Travelers Insurance Company for payment. The insurance carriers paid peti-

tioner on account of the claims and, in turn, submitted the claims to the United States for payment under the Medicare Act. Petitioner's defense at trial was that the claims were valid or, if they were not, they merely resulted from inaccurate bookkeeping.

1. Petitioner contends (Pet. 4-7) that his conviction was improper because he did not submit claims for payment directly to an agency of the United States and the indictment did not expressly refer to 18 U.S.C. 2(b) (which makes punishable as a principal one who causes an illegal act to be done); he also contends that the district court's charge with respect to the elements of the offense constituted reversible error. These contentions were thoroughly examined and properly rejected by the court of appeals, on whose opinion we rely (Pet. App. 15-24).

a. It is undisputed that petitioner's actions caused the private insurance carrier to submit false claims to a federal agency for reimbursement. Petitioner accordingly was punishable as a principal. No express reference to 18 U.S.C. 2(b) was necessary in the indictment; as the court of appeals demonstrated (Pet. App. 18-20), it was sufficient that the indictment had alleged that petitioner had "*caused* [false claims] to be presented" (emphasis added). Moreover, in view of the factual nature of petitioner's defense, he cannot, and indeed does not, contend that the omission of a reference to 18 U.S.C. 2(b) misled him to his prejudice. See Rule 7(c)(3), Fed. R. Crim. P.

b. In his instructions with respect to the elements of the offense, the judge at one point erroneously paraphrased the language of the wrong statute, 18 U.S.C. 1001. The court instructed that "claim" under 18 U.S.C. 287 refers to "a claim to a *matter within the jurisdiction* [*of any department or agency*] *of the United States*" (Pet. App. 22) (the italicized portion of the quotation is from 18 U.S.C. 1001). Insofar as that instruction suggested

that a claim presented to a private insurance company pertained to a matter outside the jurisdiction of the United States, and therefore that the presentation of such a claim was not punishable under 18 U.S.C. 287, it improperly favored petitioner. In any event, petitioner did not object to the charge at the time it was given and is therefore barred from challenging it on appeal. Rule 30, Fed. R. Crim. P. Moreover, as the court of appeals correctly noted (Pet. App. 21-24), the instructions as a whole made plain the nature of the charge against petitioner.

2. Petitioner further contends (Pet. 7-8) that it was error to admit into evidence a form signed by petitioner's counsel in petitioner's presence subsequent to his having been warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. This contention was thoroughly examined and properly rejected by the court of appeals (Pet. App. 27-29). The form in question had been given to petitioner in his counsel's presence to allow him to explain any irregularities in his claim submissions. His counsel took the form from petitioner and wrote on it "There is no irregularity." In these circumstances, there was ample basis for inferring that counsel was acting within his authority as petitioner's representative. Moreover, petitioner testified in his own behalf at trial and did not represent that his counsel had acted without his approval or consent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.